

# A GUIDE TO PROCEDURES



## Kentucky Occupational Safety and Health REVIEW COMMISSION

KOSH Review Commission  
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# **A GUIDE TO PROCEDURES OF THE KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

## **INTRODUCTION**

This pamphlet is an explanation of how proceedings are conducted by the Kentucky Occupational Safety and Health Review Commission (Review Commission). It is published as an informal explanation of the Review Commission's Rules of Procedure. It is not an official supplement to the Commission's Rules but is published as a guide so that some of the principal provisions of those Rules may be more readily understood.

Copies of the Review Commission's Rules of Procedure may be obtained by visiting the website: [www.koshrc.ky.gov](http://www.koshrc.ky.gov) or by writing to:

Kentucky Occupational Safety and Health Review Commission  
#4 Millcreek Park  
Frankfort, KY 40601

They are also published in Title 803 Kentucky Administrative Regulations, Chapter 50.

## **1. THE REVIEW COMMISSION**

The Kentucky Occupational Safety and Health Review Commission is an independent quasi-judicial agency of the Commonwealth of Kentucky. It is not affiliated with the Labor Cabinet or the Kentucky Occupational Safety and Health Program. There are three Commission members who are appointed by the Governor for four-year terms. The Commissioners must be qualified to represent the interest of employers, employees, and the occupational safety and health profession with a minimum of five (5) years' experience in their respective fields. The Review Commission employs Hearing Officers who hold hearings and make recommended orders in contests arising under the provisions of the occupational Safety and Health Act. The Hearing Officers' decisions are reviewed and the Commission has the authority to change those decisions. Hearings are usually held in or near the community where the alleged violation has occurred.

## **2. THE ROLE OF THE REVIEW COMMISSION**

Cases that come before the Review Commission result from an inspection conducted by the Kentucky Occupational Safety and Health Program, Division of Compliance. If the Compliance Officer finds what is believed to be a violation of the Occupational Safety and Health Standards, the Labor Cabinet will notify the employer in writing of the nature of the alleged violation and the period of time deemed reasonable for its correction. This document is called a **Citation**. The period of time stated in the citation for the correction of the alleged violation is called the **Abatement Period**. The Regulations require that the employer post a copy of the citation in a place where affected employees will have notice of it.

The Labor Cabinet is required to notify the employer in writing of any penalty proposed for each alleged violation. The **Notification of Proposed Penalty** usually accompanies the citation but it may be delivered as a separate document. The employer must be notified of the proposed penalty by certified mail or by personal service.

If, WITHIN FIFTEEN WORKING DAYS of receipt of the proposed penalty (Monday through Friday, excluding Saturday, Sunday, State or Federal holidays), the cited employer does not contest the citation or proposed penalty, and affected employees or their representative do not contest, the citation and proposed penalty become final order of the Review Commission and are not subject to review by any court or agency.

## **COMMISSION PROCEDURES**

### **3. HOW AN EMPLOYER CONTESTS AN OCCUPATIONAL SAFETY AND HEALTH ACTION**

Initially there are two things to be done by an employer who wishes to contest all or part of the citation received from the Labor Cabinet, Division of OSH Compliance, and/or the amount of any proposed penalty.

- (a) Within fifteen (15) working days from the receipt of the proposed penalty, the employer must notify the Secretary of Labor of his intent to contest all or part of the citation, the proposed penalty, or the abatement periods.

(This notice is called a **Notice of Contest**, see Appendix 1A and 1B.)

- (b) The employer will receive a notice from the Review Commission that the case has been filed. Then, the employer must notify affected employees and the employee representative, if any, that Notice of Contest has been filed.

Affected employees must be notified so they will know of the case in the event they wish to participate as a party. The Commission will supply forms to the employer for this purpose. (Further explanation in Section 16.)

The Notice of Contest is a written statement by the employer, or the employer's representative, that the employer intends to contest the alleged violations, the specific abatement periods, or the proposed penalties. If the employer wishes to contest all of them, that should be stated. Otherwise, the letter should state in detail those matters being contested. (Appendix 1A is an example of a Notice of Contest that contests all citations and proposed penalties; Appendix 1B is a Notice of Contest that contests only the proposed penalties.)

An employer, after receipt of a citation, and during the fifteen working day contest period, may contact the Labor Cabinet to schedule an informal conference regarding the citation. A clarification of the issues involved can be reached at the conference and aid the employer in deciding whether to contest. This conference does not extend or delay the period in which a contest must be filed.

If the employer does not contest any item cited or any proposed penalty, the abatement requirements must be fully met and the employer must pay whatever penalty is proposed. Payments should be made according to instructions of the Labor Cabinet.

#### 4. HOW AN EMPLOYEE OR EMPLOYEE REPRESENTATIVE CONTESTS AN OSH CITATION

An affected employee or employee representative may file a Notice Contest. This must be done within 15 working days of the receipt of the citation.

#### 5. WHERE TO SEND A NOTICE OF CONTEST

The employer, employee, or the employee representative must mail the Notice of Contest to:

**Kentucky Labor Cabinet  
Division of OSH Compliance  
1047 U.S. Highway 127 South  
Frankfort, KY 40601**

The Notice of Contest must not be sent to the Review Commission.

Note: The filing of this Notice of Contest in good faith and not solely for purposes of delay, or avoidance of penalties, tolls the abatement period. In other words, the time given for correcting the alleged violation does not begin to run until the entry of a final order of the Review Commission for those alleged violations which are contested.

#### 6. WHAT HAPPENS WHEN AN EMPLOYER CONTESTS AN ALLEGED VIOLATION, AN ABATEMENT PERIOD OR A PROPOSED PENALTY

The Labor Cabinet must forward the employer's Notice of Contest to the Review Commission within seven days of receipt. The Commission's secretary then notifies the employer, the Labor Cabinet, and any other parties to the case, of the Commission's receipt of Notice of Contest, and the "docket number" is assigned to the case. The Labor Cabinet is the *Complainant* in the case, and has the burden of proving that the citation and penalty are correct and the abatement date reasonable, if contested. The contesting employer is the *Respondent*, who answers the allegations.

At the time the employer is notified that the case has been filed and given a docket number, the Review Commission forwards a Notice to Employees which notifies the employees of the contested case. A **Certification of Employer** form which certifies that the Notice to Employees has been posted is sent to the employer to be signed and returned to the Commission.

The following papers should be filed:

**Complaint** – Within 20 days after receipt of Notice of Contest the Labor Cabinet must file a written Complaint with the Review Commission. A copy must be served on the employer and any other parties to the case. The complaint sets forth in detail the alleged violation(s) for which the employer received the citation. The Complaint also explains the basis for abatement period and gives the reasons for the proposed penalties.

**Answer** – The employer must file a written Answer to the Complaint. A copy must be served on the Labor Cabinet and all other parties to the case. The Answer may be either a general denial of the

Complaint, or a direct response to those statements in the Complaint that the employer admits, denies, or wishes to explain. Charges in the Complaint not denied in the Answer will be considered to be admitted by the employer.

**Notice of Assignment to Hearing Officer** – After the Answer to the Complaint, the parties will receive a Notice of Assignment to the Hearing Officer. This document will give the name and address who will preside at the hearing. After assignment of the case to a Hearing Officer, all papers should be filed with the designated Hearing Officer until a recommended order has been issued.

The parties will be notified of the time and place of the hearing at least 10 days in advance. In order that affected employees, if any, may be informed of this date, the notice must be posted by the employer. (The Review Commission will supply a Notice of Hearing form for this purpose.)

## **7. WITHDRAWAL OF NOTICE OF CONTEST**

An employer who has filed a Notice of Contest and wishes to withdraw it may do so at any time if the employer:

- (a) Shows that the alleged violation(s) has been corrected or shows when it will be corrected according to a settlement negotiated with the Labor Cabinet;
- (b) Pays the amount of the proposed penalty or the penalty negotiated in a settlement;
- (c) Serves notice on affected employees and their employee representative that Notice of Contest is withdrawn.

## **8. SETTLEMENT**

The Review Commission encourages the settlement of cases. The Labor Cabinet and the employer must agree to the settlement terms, and affected employees or their representative must be afforded an opportunity to participate in the settlement.

## **9. HEARINGS**

The hearing is usually conducted in or near the community where the alleged violation occurred.

At the hearing a Review Commission Hearing Officer will preside. The Labor Cabinet has the burden of proof in all cases where a Notice of Contest has been filed. The basis for each contested violation must be established through evidence introduced at the hearing. Each party to the proceedings may call witnesses, introduce evidence, and cross-examine opposing witnesses. The Hearing Officer is permitted to consider only matters rose during the hearing.

A transcript of the hearing will be made by a court reporter. A copy may be purchased from the reporter.

## **10. PROCEDURE AFTER HEARINGS**

After the Hearing Officer has heard the evidence and considered the written brief's submitted, if any, a **Recommended Order** will be issued. Each party will receive a copy. The Recommended Order becomes a final order of the Review Commission forty (40) days after date of issuance unless within that forty (40) day period any Commission member directs that the case be reviewed by the full Commission.

A party aggrieved by the Hearing Officer's Recommended Order may file a **Petition for Discretionary Review** with the Commission. The Petition for Discretionary Review must be received by the Review Commission on or before the 25<sup>th</sup> day following the date of issuance of the Recommended Order. The Petition should state the reasons why the petitioner believes the case should be reviewed (See Appendix 2.)

When the Review Commission does decide to review a Hearing Officer's decision, the parties are notified and given an opportunity to submit written briefs (statements) setting out why the party agrees or disagrees with the Hearing Officer's decision. Parties are not required to appear in person before the Review Commission but oral arguments may be allowed in extraordinary cases.

When the Review Commission does not grant review of a Hearing Officer's Recommended Order the order becomes a final order of the Review Commission forty (40) days after date of issuance. It may then be appealed within thirty (30) days to the Franklin Circuit Court.

## **11. PETITION FOR MODIFICATION OF ABATEMENT**

There are some instances where an employer has not contested an OSH citation within 15 working days after receipt of the proposed penalty, or where the Review Commission has issued a final order and the employer wants a change in the required abatement date. A party adversely affected by a ruling of the Labor Cabinet on an application for modification of an abatement period may appeal such notification to the Labor Cabinet, provided such appeal is filed within fifteen (15) days of receipt of such notice in the event the ruling of the Labor Cabinet is issued after the abatement date, or no later than the close of the next working day following the date on which abatement is required.

The Labor Cabinet must send this petition to the Review Commission within seven (7) working days after its receipt along with pertinent and relevant records considered by the Cabinet in making its ruling.

The Review Commission may consider the matter on the record or may require further hearing, pleadings, or information in the matter.

## **OTHER IMPORTANT MATTERS**

### **12. DEFINITIONS OF AFFECTED EMPLOYEE**

The Review Commission's Rules of Procedure defines "affected employee" as an employee of a cited employer who is exposed to the alleged hazard described in the citation, as a result of his assigned duties.

### **13. ELECTION OF PARTY STATE BY EMPLOYEES**

When a notice of contest is filed by an employer, an employee or authorized employee representative may elect party status at any time before commencement of the hearing, or if no hearing is held, within the time period a motion for dismissal is required to be posted.

### **14. ELECTION OF PARTY STATE BY EMPLOYERS**

Where a notice of contest is filed by an employee or employee representative, the employer may elect party status at any time before commencement of a hearing, or if no hearing is held, within the time period a motion for dismissal is required to be posted.

### **15. SERVICE OF PAPERS ON OTHERS**

Copies of all papers filed with the Review Commission or a Hearing Officer must be served on all other parties to the case. Service may be accomplished by postage prepaid first class mail or by personal delivery.

A statement that service has been made must be attached to any papers submitted for filing with the Review Commission. The statement must show date and manner of service, mail or personal delivery, and the names of the persons served. This statement is called a **Certificate of Service**.

### **16. NOTIFYING EMPLOYEES OF THE CASE**

An employer who files a Notice of Contest is required to give notice to all affected employees as explained below:

- A. If there are any affected employees who are not represented by a union, the employer is required to:
  - (1) Post a copy of the notice of contest at each place where the citation is required to be posted; and
  - (2) Post a notice informing affected employee of their right to participate in the case. (The Review Commission will supply a form for this purpose.)
- B. If any of the affected employees are represented by a union the employer is also required to:
  - (1) Mail or deliver personally to the union representative a copy of the notice of contest; and
  - (2) Mail or deliver personally to the union a copy of the notice supplied by the Review Commission informing affected employees of their right to participate.

If some employees are represented by a union and some are not, the employer must comply with all of the requirements listed in A and B above.

The employer must also notify the Commission that those requirements for notifying affected employees have been accomplished. (The Review Commission will supply a Certification of Employer form for this purpose.)

#### **17. MAINTAINING COPIES OF PAPERS FILED WITH THE HEARING OFFICER OR REVIEW COMMISSION**

In order that affected employees who are not represented by a union (whether or not they have become a party in the case) may have the opportunity to be kept informed of the status of the case, the employer must keep available at some convenient place copies of all pleadings, and other documents filed in the case, so they can be read at reasonable times by affected employees.

#### **18. APPEARANCES IN REVIEW COMMISSION PROCEEDINGS**

Any party may appear in a Review Commission proceeding in person or through a representative. Such a person is **not** required to be an attorney at law. Where affected employees are represented by an authorized employee representative, only that authorized employee may appear.

#### **19. PENALTIES**

The Labor Cabinet only proposes amounts which it believes are appropriate as penalties. These proposals automatically become penalties assessed against the cited employer when the action is not contested within the contest period. Once a proposed penalty is contested, the amount of penalty, if any, will be decided by the Review Commission.

When a case goes to a hearing before a Review Commission Hearing Officer, the employer's evidence and argument on what penalty, if any, should be assessed, receives the same consideration as the evidence and argument of the Labor Cabinet on this matter.

The four factors that the regulations require the Labor Cabinet to consider in proposing the penalties are:

- (1) The size of the business of the employer being charged;
- (2) The gravity of the violation;
- (3) The good faith of the employer; and
- (4) The employer's history of previous violations.

The amounts that may be assessed as civil penalties are as follows:

For a serious or non-serious violation, up to \$7,000.00;

For a willful or repeated violation, up to \$70,000.00;

For failure to correct a violation within the period permitted, up to \$7,000.00 for each day it remains uncorrected.



## **20. ONE-SIDED COMMUNICATIONS OF PARTIES EX PARTE COMMUNICATIONS**

Parties to cases before the Review Commission may not communicate ex parte (in a one-sided manner) with respect to the merits of any undecided cases with the Hearing Officer, a Review Commission member, or an employee of the Review Commission involved in deciding the case. In other words, no participant, directly or indirectly, may discuss the case or make any argument about a matter in a case unless done in the presence of the other participants who are given an equal opportunity to present their side or unless it is done in writing and copies are sent to all other parties. Violation of this rule may result in dismissal of the offending party's case before the Review Commission.

This prohibition does not, however, preclude asking questions with respect to scheduling of a hearing or about procedural matters.

## **21. COURT REVIEW**

Any party not satisfied or wronged by a final order of the Review Commission that was issued after a case has been initiated by the filing of a notice of contest may take the case to the Franklin Circuit Court pursuant to KRS 338.091.

## **APPENDIX 1 A**

### **NOTICE OF CONTEST TO CITATION AND PROPOSED PENALTIES**

ABC Construction Co.  
Pine Road  
Louisville, KY

March 1, 2000

OSH Compliance Division  
Kentucky Labor Cabinet  
U.S. 127 South  
Frankfort, KY 40601

Sir:

This is to notify you that ABC Construction contests all of the items and penalties alleged in the citation and proposed penalty which we received February 27, 2000, dated February 25, 2000 (a copy is attached).

Very truly yours,

John Doe, President  
ABC Construction Co.

## **APPENDIX 1B**

### **NOTICE OF CONTEST TO PROPOSED PENALTIES ONLY**

Milton Corporation  
Lake Drive  
Paducah, KY

April 4, 2001

Director of Compliance  
OSH Compliance Division  
Kentucky Labor Cabinet  
U.S. 127 South  
Frankfort, KY 40601

Sir:

We wish to contest the proposed penalties of \$1,000.00 issued on March 27, 2001. We believe that they are unreasonable for a number of reasons.

Sincerely,

Thomas Reed  
Manager

**\*Note: If only the penalties are contested within the 15 day period, the citations will become final orders of the Review Commission and cannot be considered at the hearing.**

## **APPENDIX 2**

### **PETITION FOR DISCRETIONARY REVIEW**

KOSHRC #1234-01

SECRETARY OF LABOR  
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

ABC CONSTRUCTION CO.

RESPONDENT

### **PETITION FOR DISCRETIONARY REVIEW**

Respondent ABC Construction disagrees with the Hearing Officer's decision in this case and hereby submits this Petition for Discretionary Review.

ABC Construction takes exception to finding that the company violated the standards as charged. The penalty imposed is also expected to as unreasonable.

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John Doe, President  
ABC Construction Co.